



FH  
[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]

DECISION

MPA/146233

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 26, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability (DHCAA) now known as the Office of Inspector General (OIG) in regard to Medical Assistance (MA), a telephonic hearing was held on February 14, 2013, at Racine, Wisconsin.

The issue for determination is whether petitioner is eligible for payment by the MA program for Speech Language Therapy (SLT) services as requested in a prior authorization (PA) request.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street  
Madison, Wisconsin 53703

By written submittal: Theresa Walske, SLP Consultant  
Division of Health Care Access and Accountability  
1 West Wilson Street, Room 272  
P.O. Box 309  
Madison, WI 53707-0309

**ADMINISTRATIVE LAW JUDGE:**

Kelly Cochrane  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Racine County. He was three years old at the time of the PA request and is diagnosed with Autism.
2. On November 14, 2012 the petitioner's private SLT submitted a PA request to the DHCAA. The request was made for 26 sessions of SLT beginning November 15, 2012. See Exhibit 1.
3. On December 11, 2012 the DHCAA issued a notice to petitioner denying the PA request because it concluded that the SLT regimen requested was not medically necessary under Wisconsin's MA rules.
4. Petitioner receives SLT in school 3 times per week/90 minutes per week. The goals as described in petitioner's Individualized Education Plan (IEP) show that during school, the plan of care (POC) is:
  1. During free play and small group activities [petitioner] will match and sort objects, pictures, colors and shapes with 75% accuracy 4 trials. Current levels are at <25% accuracy.
  2. Adult interaction: [petitioner] will greet familiar adults spontaneously and listen to story read by an adult for 2 min. during small group activities in 4 out of 5 trials. Current levels are 0 out of 5 trials. Peer interaction: During play time [petitioner] will tolerate other children in the same play area and play next to a peer using the same materials/toys in 4 of 5 trials. Current levels are 1 out of 5 trials. He will watch other children.
  3. [Petitioner] should be encouraged to "Use his words" as opposed to vocalizations when he is ready. (0% spont; 50% imitation) Using visual cues, [petitioner] will begin to identify by pointing and/or verbally label objects in response to the "What's this?" question (on demand) for 3 of 5 opportunities. (0% identification; 0% label). Using visual cues, [petitioner] will imitate target speech sounds in words for 4 of 6 trials. (0%).
  4. [Petitioner] will practice oral motor exercises for strength and flexibility or the oral musculature by: a) elevating and depressing the tongue repeatedly and smoothly, independent of jaw movement; b) lateralizing the tongue repeatedly and smoothly, independent of jaw movement; c) positioning the tongue in a variety of positions that correspond with position of speech sounds; d) puckering and retracting the lips repeatedly and smoothly; correctly as judged by the SLP across one progress period. Baseline: not observed to do any of them.
5. The POC for the requested PA lists the following short term goals:
  1. [Petitioner] will demonstrate understanding of following simple two part verbal commands with 9/10 accuracy across 3 sessions during POC period.
  2. [Petitioner] will participate in turn taking games to improve age appropriate social skills 9/10 times given moderate-maximal cues.
  3. [Petitioner] will demonstrate increased understanding of action vocabulary as measured by identification/labeling of actions in pictures with 90% accuracy given moderate-maximal cues.
  4. [Petitioner] will answer basic yes/no questions within structured activities with 70% accuracy given moderate-maximal cues.

### **DISCUSSION**

Speech and language therapy is an MA-covered service, subject to prior authorization after the first 35 treatment days. Wis. Admin. Code, §DHS 107.18(2). In determining whether to approve such a therapy request, the DHCAA employs the generic prior authorization criteria found at §DHS 107.02(3)(e). Those criteria include the requirements that a service be medically necessary, appropriate, and an effective use of available services.

“Medically necessary” means a medical assistance service under Chapter DHS 107 that is:

- (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
- (b) Meets the following standards:
  1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
  2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider and the setting in which the service is provided;
  3. Is appropriate with regard to generally accepted standards of medical practice;
  4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
  5. Is of proven medical value or usefulness and, consistent with s. DHS 107.035, is not experimental in nature;
  6. Is not duplicative with respect to other services being provided to the recipient;
  7. Is not solely for the convenience of the recipient, the recipient's family or a provider;
  8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
  9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Admin. Code §DHS 101.03(96m).

It is the provider's duty to justify the provision of the services when requesting the PA. The DHCAA denied the PA here because it found a lack of justification to support continued *private* SLT services under Wis. Adm. Code §§DHS 107.02(3)(d)6 and 9 due to the fact that he receives SLT services in the school.

The Department has ruled on when therapy from one provider duplicates that from another. Deputy Secretary Susan Reinardy held in *DHA Final Decision No. MPA-37/80183*, a speech therapy appeal, that “the deciding factor in whether services are duplicative is not the [therapy] technique utilized by the therapists, but the goals and outcomes being addressed by the therapists.” *Id.* at 2. It does not matter if one provider addresses group activities with peers and the other one-on-one activities with an adult. A requested service duplicates “an existing service if the intended outcome of the two services is substantially the same.” *Id.* at 3. That Final Decision specifically rejected additional therapy because the recipient “‘needs’ more intense services than the school provides.” The holding rests on the principle that “Medicaid may not pay for two services if both services have the same intended outcome or result with respect to the medical condition the services are intended to address.” *Id.* at 4. The Deputy Secretary has made it clear that the “intended outcome” test must be read broadly. In *DHA Final Decision No. MPA-49/82886*, a decision reiterating the principle laid down in *MPA-37/80183*, she pointed out that the intended outcome was the same if both therapists were working to develop similar functional skills. The unstated rationale underlying the Deputy Secretary's decision, at least as it pertains to private therapy that duplicates school therapy, is that federal law requires school districts to meet the special needs of its

students and the Department will not allow a school district's failure to comply with this obligation to provide the reason for funding another source of therapy. The Deputy Secretary's Final Decisions are binding on administrative law judges, meaning that they must follow those decisions.

The petitioner's representatives submitted an unpublished circuit court decision to show that the definition of "duplicative" as defined by the Final Decisions above were overruled. However, such decisions have no precedential value and are not binding on administrative law judges unless the decision is made in the particular case being heard. See 105 A.L.R.5th 499. Final Decisions of the Department, on the other hand, remain binding on administrative law judges, even if a circuit court disagrees with them. See Administrative Law and Practice, §5.28. Based on this, there is not enough to establish the medical necessity of the sought additional private SLT regimen under these Final Decisions. The assertions that group treatment is insufficient versus 1:1 SLT treatment; or that the private regimen is necessary for functional improvement in the home and community versus in the educational setting; are without merit in this analysis. The question is: are these regimens in essence duplicative in addressing the child's condition? I can only conclude that they are. Both the school and the private provider are providing SLT services that are designed to improve his functional communication, vocabulary, receptive and expressive communications, and social skills. Further, following directions and answering yes/no questions would be something that should be reinforced throughout petitioner's day at school. I find that the petitioner has not established by clinical documentation the medical necessity of the additional private therapy as that term is used by the MA Program, and the Department's denial must be affirmed.

Nothing in this Decision prevents the petitioner and his private provider from submitting a new PA Request for a new SLT regimen that better documents the medical necessity of the sought private regimen.

### **CONCLUSIONS OF LAW**

Petitioner is not eligible for payment by the MA program for the SLT services requested in the PA request because it would duplicate the SLT services he receives in his school.

**THEREFORE, it is**

**ORDERED**

The petition for review herein is dismissed.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

**APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

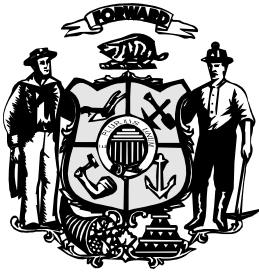
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 4th day of March, 2013

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\sKelly Cochrane  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on March 4, 2013.

Division of Health Care Access And Accountability